U.S. Department of Labor

Board of Alien Labor Certification Appeals
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September 20, 2001

BALCA Case No. 2001-INA-126
(formerly 1999-INA-10)
ETA Case No. P1997-PA-03046325

In the Matter of:

PERRIN C. HAMILTON, ESQUIRE,
Employer

on behalf of

BARBARA DANKO,
Alien

Certifying Officer: Richard E. Panati
Philadelphia, Pennsylvania

Appearance: Paul Janaszek
New York, New York
For the Employer and Alien

Before: Burke, Wood and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of an application for alien labor certification. The certification of aliens for permanent employment is governed by section 212(a)(5) of the Immigration and Nationality Act, 8 U.S.C.§1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under §212(a)(14) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform

the work: (1) there are not sufficient workers in the United`States who are able, willing, qualified, and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

This decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in the appeal file and any written arguments. 20 C.F.R. § 656.27 (c).

STATEMENT OF THE CASE

On May 15, 1997, the Employer filed an *Application for Alien Employment Certification* (ETA 750) to permit the employment of the Alien as a Cook, Polish at a salary of $11.44 per hour. In a Final Determination, dated August 4, 1998, the CO, citing the definition of "employment" found in 20 C.F.R. §656.3, held:

> The details you provided do not establish that this is a full-time position. Your rebuttal evidence does not show that you entertain frequently or that the alien will be involved on a full-time basis in preparing meals for family members to consume. Most family members are outside the home working or attending school for the greater part of the alien's daily work schedule. Your application remains in violation of Federal regulations because you have not shown that the position of cook as performed in your household clearly constitutes full-time employment.

The Employer requested a review by this Board and on April 7, 1999, the Board issued a Decision and Order (D&O) remanding the matter for reevaluation consistent with *en banc* decisions in *Daisy Schimoler*, 1997-INA-218 (Mar. 3 1999) and *Carlos Uy III*, 1997-INA-304 Mar. 3, 1999.

Upon return of the case to the CO, he issued a new Notice of Findings (NOF) proposing to deny the application pursuant to section 656.20(c)(8) on the basis that the Employer had not established that the position of Domestic Cook in his household is a bona fide job opportunity which actually exists. The Employer was instructed that to rebut this finding, he must, at a minimum, respond to the following 12 questions:

> (1) State the number of meals prepared per day and per week; the length of time required to prepare these meals each day and each week; and the number of people for whom the meals are prepared.
>
> (2) Provide the work and/or school schedules of all persons residing in the household.
>
> (3) How frequently do you entertain? Describe in detail how often you entertained in the *twelve (12) calendar months* immediately preceding the filing of the application.

List the dates of the entertainment, the number of guests entertained, the number of meals served, etc. To what extent will the Domestic Cook be involved in preparing food for guests?

(4) If there are pre-school or school aged children [answer questions concerning their care in the parents' absence.]

(5) Describe any special dietary circumstances of the household, e.g., nutritional requirements. All special dietary requirements must be accompanied by a physician's statement.

(6) What percentage of the employer's disposable income will be devoted to paying the alien's salary? Your answer must be supported by providing a copy of your Federal Income Tax Return for the immediately preceding calendar year.

(7) If there are other domestic workers employed in the household, please list all positions, duties, and corresponding weekly hours of employment.

(8) Has the household ever before employed a Domestic Cook? If not, why circumstances led to the current job offer?

(9) If applicable, when the alien was initially hired, what were the alien's duties and what were the wages paid?

(10) What is the alien's training and experience as a Cook? To what extent has that training and experience involved cooking in a domestic situation?

(11) How did the alien learn of the job offer?

(12) What is the nature of the relationship between the alien and the employer (familial, friendship, or any other special connection)?

The Employer's response to this second NOF was to a large extent repetition of his rebuttal to the first NOF. He noted that the household currently consisted of his wife and himself but that they had grown children and grandchildren who visit for dinner three nights per week. Their regular work schedule is typically from 9:00 a.m. to 5:00 p.m. Monday through Friday. In addition they work overtime hours at home. Their extremely heavy work schedule allows no time for quality food preparation which they consider very important to the well being and lifestyle of their family and themselves. The Employer is an Attorney at Law and his wife is a partner in a real estate business and they entertain professional associates twice/three times weekly. To meet the needs of their household as well as social and professional guests, they require a cook to work 8 hours per day, Monday through Friday from 8 a.m

to 5 p.m. The cook will prepare breakfast for the Employer and his wife; prepare and either serve lunch for the two of them or package it for consumption at work; and prepare and store dinner to be set out later in the evening. In addition to food preparation, the cook will shop for food supplies, clean the kitchen and bake bread and pastries. The cook will not be required to perform other than food related tasks. Cleaning duties are performed by hired help for cleaning and maintenance.

The Employer maintained that the position of cook has always existed in his household and provided a history of those who had been so employed from the 1960's to 1996. They have been unable to find anybody who was willing or qualified to fill the job opening created by the death, in 1996, of their cook. The Alien was recommended to them by a friend. A copy of a document attesting to her experience as a cook was resubmitted with the rebuttal.

The Employer represented that the cook's wages was about 30% of their disposable income and submitted a copy of their 1996 Federal Income tax return.[1] The return lists both the Employer and his wife as being "retired." It shows that their business income was only about 18 percent of their total gross income with the remainder being derived from taxable and non-taxable interest, capital gains, dividends, IRA distributions, pensions and annuities and Social Security benefits.

The rebuttal included a list of dates when the Employer and his wife purportedly entertained their professional guests for dinner. These included February 3, 10 and 17 and March 3 and 24, 1997. Also submitted by the Employer were copies of statements from 1996 and 1997 as evidence of expenditures for business entertainment. These included monthly invoices from The Union League of Philadelphia for July 1996, October 1996 through March 1997, and May, July, September and October 1997. This set of statements show that lunch was partaken at this club on an average of 11 times per month. In less than five of these occasions did the charge for lunch exceed $20.00. There were only 8 occasions during this period when there were charges for dinner. On one such occasion the charges came to $466.65. The remainder were $175.00 or less.

Invoices from the Merion Cricket Club for January through April 1997, July 1997, September through December 1997, and February and March 1998 show that an average of 7.75 meals per month were taken at this venue. Of the approximate 111 meals, 95 are identified as dinner ("D") and the remainder lunch ("L"). Prices, including tax and gratuity, range from a low of about $8.00 to a high of $220.00 with the average being about $35.00. There were 5 dinners which exceeded $100.00. Dinners were charged on February 3, 10, and 17 and March 3 and 24, 1997. Prices ranged from $26.00 to $37.33

Upon receipt of the Employer's rebuttal, the CO proceeded to issue a Final Determination denying certification on the following basis:

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[1]According to our calculations, the Alien's salary would represent about 26% of the Employer's after tax income.

> In summary, your responses to Questions 1 through 4 are basically the same as your rebuttal to the previous NOF dated June 26, 1998. Your answers to the remaining questions indicate that there are no special dietary requirements; there are no other domestic workers employed in the household; the alien has never been employed by you; the alien posses over two years experience as a cook; the alien learned about the job through your friends; the alien is not related to the prospective employers; and about 30 percent of your disposable income will be devoted to paying the alien's salary.
>
> The details you provided do not establish that there is a bona fide position in your household. Rather, the evidence shows that it is more likely that the alien will be employed as a General Houseworker than a Domestic Cook. Your rebuttal evidence does not show that you entertain frequently or that the alien will be involved on a full-time basis preparing meals for family members to consume. Most family members are outside the home working for the greater part of the alien's daily work schedule. Consequently, while the alien may cook some meals, it is implausible that the alien will be engaged as a full-time Domestic Cook because there is no one at home to eat most of the meals that the alien supposedly will prepare and serve.

The Employer again requested a review of the denial of his application and the record has been submitted to the Board for such purpose.

FINDINGS AND CONCLUSIONS

In *Daisy Schimoler, supra,* the Board stated:

> We hold that the definition of employment in section 656.3 cannot be used to attack the employer's need for the position [of household cook] by questioning the hours in which a worker will actually be engaged in work-related duties. Focusing solely on whether the employment will keep the worker substantially engaged throughout the day casts the problem in the wrong light — the true issue being whether the employer has a *bona fide* job opportunity. It also produces a degenerative analysis where an employer is placed in the position where it can only rebut trying to justify near an eight hour a day work schedule for a worker, and the CO is merely second guessing the employer's justifications with assumptions about what a typical family needs in the way of cooking.

(Footnote omitted.)

And, in the companion case of *Carlos Uy III, supra*, we held:

> Section 656.20 (c)(8) of the Department's labor certification regulations requires that

> the employer offer a *bona fide* job opportunity. *Bulk Farms v. Martin*, 963 F.2d (9th Cir. 1992); *Modular Container Systems, Inc.*, 89-INA-228 (July 16, 1991) (*en banc*). Whether a job opportunity is *bona fide* is gauged by a 'totality of the circumstances' test. *Modular Container System, Inc.* 89-INA-228, *supra*. When an employer presents a labor certification application for a 'Domestic Cook' attention immediately focuses on whether the application presents a *bona fide* job opportunity because common experience suggests that few households retain an employee whose only duties are to cook, or could even afford the luxury of retaining such an employee. The DOT contemplates that a domestic cook is a skilled, professional cook, and would be able to cook sophisticated meals, as illustrated by much higher experience requirement. Thus, such an application raises a question of whether the employer is really seeking a housekeeper, nanny, companion or other general household worker, or is attempting to create a job for the purpose of assisting the alien in immigrating to the United States. One motive for categorizing a job as a domestic cook rather than as another type of domestic worker is to avoid the long wait for a visa for an unskilled laborer under IMMACT 1990. If a labor certification application mischaracterizes the position offered, the job is not clearly open to U.S. workers in violation of section 656.20(c)(8), because the test of the labor market will be for higher-skilled domestic cooks rather than lower-paying domestic positions that include cooking duties. Thus, we conclude that the CO acts properly in invoking section 656.20(c)(8) when he or she suspects mischaracterization of the job.

(Footnotes omitted.)

The Board then went on to set out guidelines for a "factual circumstances" test. These included, but were not limited to, such factors as the percentage of the employer's disposable income that will be devoted to paying the cook's salary; whether the employee will be required to perform other functions, such as general cleaning; whether other domestic workers are employed; and whether the employer has retained domestic cooks in the past. Additionally, the Board noted that a focus on whether the person occupying the position will be gainfully occupied for a substantial portion of the work day may overstate its importance as it is possible that some employers may be willing to pay a domestic cook a full-time salary even though that employee may not be gainfully occupied for a substantial portion of the day.

At first glance it may appear, as the Employer contends, that the CO did focus again on whether the Alien will be gainfully occupied for a substantial portion of the day performing cooking duties. However, the Board also held in *Uy*:

> The heart of the totality of the circumstances analysis is whether the factual circumstances establish the credibility of the position. In applying the totality of the circumstances test, the CO's focus should be on such factors as whether the employer has a motive to misdescribe a position; what reasons are present for believing or

> doubting the employer's veracity or the accuracy of the employer's assertions; and whether the employer's statements are supported by independent verification.

Although he did not do so with much clarity or accuracy, the essence of the CO's findings was that the Employer's rebuttal was not creditable in certain respects. While the Board noted in *Uy* that a CO has an obligation to review the employer's rebuttal documentation and to state in the Final Determination what aspects of that documentation are deficient, it went on to hold:

> That said, it must be observed that if the CO's NOF provides an employer with adequate notice of the nature of the violation, the basis for the CO's challenge, and instructions for rebutting or curing the deficiencies, an employer's complaint about the brevity of the CO's Final Determination on appeal will not change the fact that it was Employer's burden on rebuttal to produce sufficient evidence to show entitlement to a labor certification. *See Top Sewing, Inc. and Columbia Sportswear*, 95-INA-39 (Jan. 28, 1997 (per curiam). Thus, the Board would not rule out affirming a denial of labor certification even in the absence of a fully reasoned Final Determination if the NOF provided adequate notice, and the employer's documentation was so lacking in persuasiveness that labor certification necessarily would be precluded.

In the instant case, the Employer represented to the CO that both he and his wife are occupied from 8:00 a.m. to 5:00 p.m., five days per week, in their respective professions. However, they have represented to the Internal Revenue Service that they were retired in 1996 and the earnings reported from business income would indicate that they are at best engaged in business activities on a very limited basis. The Employer represents that a cook is needed to prepare lunch for his spouse and himself five days per week. However, his club charges show that one or the other of them take their lunches at one or the other of their clubs on a regular basis. Then there is the issue of business entertainment. The club invoices in all but a few instances would not indicate that guests are being entertained at their clubs for either lunch or dinner. Interesting is the fact that on some of the dates when the Employer purportedly entertained at dinner at home, the Marion Cricket Club invoices indicate that dinner was taken at the Club.

The Employer maintains that they did employ persons in their home on a regular basis until 1996 but there is no documentation that these employees were engaged totally in cooking their meals. The Employer contends that he has been unable to find a replacement in spite of advertising for the position.[2] There is no explanation as to who prepared their meals subsequent to 1996 including the

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[2]We note that the advertisement for the position was for a Polish Cook. In this regard see the Board's recent *en banc* holding in *Martin Kaplan*, 2000-INA-23 (July 2, 2001) (cooking specializations for Domestic Cooks are restrictive and narrow the availability of otherwise qualified U.S. workers).

number of occasions during 1997 which have been listed as business diners.

We do not mean to imply that it is necessary for an employer to establish in every case that a Domestic Cook is needed because of business entertainment requirements. But, once an employer represents that such is the case, it is expected that the evidence he or she submits in this regard is creditable. In essence then, the documentation supplied by the Employer does not support his representations that this is a bona fide job opening. Nevertheless, as we did in *Uy* we add the following:

> A finding that testimony lacked credibility does not alone justify the conclusion that false testimony has been given. False testimony means knowingly giving false information with an intent to deceive. A lack of credibility does not necessarily stem from a conclusion that the speaker intends to deceive. As a California district court stated, to assume that 'a witness whose testimony is not accepted by the trier of fact is a perjurer and not a person of good moral character...is not only legally invalid, but is contrary to the basic sense of fairness upon which our legal system is founded.'" *Acosta v. Landon*, 125 F.Supp. 434, 441 (S.D. Cal. 1954).

The second NOF gave the Employer adequate notice of what he needed to establish, and we agree, in substance, with the CO that he has not shown a bona fide job opportunity exists in this case. Accordingly, his application for certification was properly denied.

ORDER

The Certifying Officer's denial of labor certification is hereby upheld.

Entered at the direction of the panel:

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Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity in its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, DC 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.